UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

MINNESOTA EPILEPSY GROUP, P.A. Employer/Petitioner and MINNESOTA'S HEALTH CARE UNION, LOCAL 113, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO Union	Case 18-UC-398

DECISION AND ORDER

By this petition, the Employer/Petitioner (Employer) asks that I exclude the classification of neuro technician from a unit represented by the Union. The Union contends that the neuro technician classification belongs in the unit because it shares a community of interest with the other employees represented by the Union. I conclude that the neuro technicians should be included in the existing unit represented by the Union because these employees share a strong community of interest with the represented employees and cannot be separately represented. There is also no record evidence that these employees share a community of interest with any other employees.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's ruling are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

[1] The Employer, Minnesota Epilepsy Group, P.A., a Minnesota corporation with a place of business in St. Paul, Minnesota is engaged in the business of medical care specializing in epilepsy treatment. During the past calendar year, a representative period, the Employer purchased and received goods in excess of $50,000 directly from points located outside the State of Minnesota. In view of the fact that the Employer stipulated it is engaged in commerce within the meaning of the Act, and based on prior cases involving this Employer, I also conclude that the Employer grossed revenues in excess of $250,000 in the past calendar year.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. In order to understand my conclusion that the neuro technicians (neuro techs) should be included in the existing unit, I will first summarize the record regarding the Employer's operation. The second section of this decision will describe the collective bargaining relationship between the Employer and Union, including the existing unit of employees. Next I will describe the jobs of the employees currently represented by the Union, as well as the jobs of the neuro techs. Finally, prior to explaining my conclusion, I will compare the working conditions of unit employees to the working conditions of the neuro techs.

EMPLOYER'S OPERATION

The Employer operates a medical, physician-based practice primarily providing specialty care for people with seizure disorders. The Employer has an office in the Richie Medical Building, in St. Paul, Minnesota, which is connected by a skyway to two hospitals, Children's and United. These two hospitals are physically connected to one another and share some services. It appears from the record that both unit employees and the neuro techs work primarily in the two hospitals. That is, there is no evidence suggesting that any of these employees perform any work at any other hospital, or at any other locations with any regularity.[2]

There are several "cost centers" utilized by the Employer, determined according to the budgetary process. These cost centers include administration, business office, EEG, front office, image-guided, information technology, nurse psychology, nursing, physician and research. Thus, unit employees (EEG) are a separate cost center from neuro techs (image-guided), and image guided is its own cost center. However, the Employer has also organized its employees into departments, which are set forth in an organizational chart in evidence. The chart reveals that departments do not correspond to "cost centers." Rather, as further described below, EEG techs and neuro techs are in the same department.

All employees, including the physician-owners of the Employer, have the same benefits, including health insurance and a 401(k) plan.

Rita Meyer is the Administrative Director of the Employer and has held that position since 1989. She is responsible for financial/budgeting issues, project planning and contract negotiation, as well as supervising the managers of the various departments. She reports to the

[2] One employee testified that a surgeon may request that an adult patient receive his/her MRI scan at St. Paul Radiology which is connected to United Hospital by an underground tunnel. It appears that some long-term monitoring of EEG patients may occasionally occur at the Richie Building. Besides that, there is no record evidence that either the EEG techs or the neuro techs work at any other facility.

physician owners and the Board of Directors. Directly under Meyer and reporting to her are the managers/directors of the various departments. The Director of the EEG Department is Edwin Carlson. The employees in the EEG department include the EEG techs, the monitor techs and the neuro techs.

Under Carlson, and in the EEG department, are two supervisors. They are EEG Supervisor DeAnne Nelson and Information Training Supervisor Phyllis Weiss. Carlson has general responsibility for the department. Both Nelson and Carlson supervise the neuro and EEG techs, while Weiss has no supervisory responsibility for the neuro techs, but only for EEG techs.

There are roughly 29 full-time employees (FTEs) employed as EEG techs, and 2.5 FTEs employed as neuro techs.[3]

COLLECTIVE BARGAINING RELATIONSHIP

The Employer and the Union have a collective bargaining relationship, though the record does not disclose when the Union was recognized. The most recent contract was effective January 1, 2001 through December 31, 2003. Negotiations for the current contract are ongoing. According to the recognition clause, the Employer recognizes the Union as the exclusive representative of all full-time and regular part-time, temporary and casual EEG Technologists, EEG Associates, Recording Technicians and Monitor Technicians.

The Union filed a grievance on October 30, 2003, regarding the creation of the neuro tech position alleging "failure to notify the Union of a new job classification," under an article of the contract. The current status of the grievance is unclear in the record. During ongoing negotiations for the new contract, the parties discussed the unit placement of the neuro tech position, but did not resolve the issue, apparently agreeing to leave it to a unit clarification proceeding.

No party contends that this petition is untimely.

THE JOBS OF EEG TECHS AND NEURO TECHS

EEG Techs

The employees currently represented by the Union are generally referred to as EEG techs. EEG stands for electroencephalography, which is the measure and/or study of electrical activity of the brain. Essentially, the EEG techs record electrical signals of the brain and nervous system through electrodes, which are placed directly on the patient's head, and which relay the

[3] One of the three neuro techs works part-time in the information technology department and part-time in the EEG department as a neuro tech. However, it appears from the record that his stint as a neuro tech will end as soon as the newly hired neuro tech is fully trained.

information to a recording system consisting of amplifiers and computer systems. Everything is done digitally. There are five levels of proficiencies within the EEG tech classification, each with different job responsibilities.

EEG Associates are Level 1 employees. They are taught how to move the cameras, how to recognize seizures and how to report questionable seizure events. Essentially, these employees watch the monitors and identify seizure activity. Level 1 is an entry-level position, requiring only a high school education. Second, are the EEG Associates, Level II. To become a Level II Associate an employee can complete a technical college program or learn the position by on-the-job training. Level II Associates place the electrodes on patients' heads for the purpose of recording the electrical activity of the brain. The next level (Level III) is classified as EEG technologists. Many Level III employees have a technical college degree, although that is not requirement. Level III employees can do all of the routine functions required of EEG techs, including clinic outpatient EEGs, and setting up patients for long-term monitoring. At the next level are the Level IV EEG techs. Many of them have two-year degrees. There are two types of employees at Level IV, and both go into the operating room. One type records the electrical activity specifically of the brain and the other does intraoperative monitoring of nerve pathways. Employees who monitor nerve pathways actually stimulate specific parts of the nerve pathways and then record the stimulus and its effect as it travels up the nerve pathway to the brain or from the brain down the nerve pathways. Level IV EEG techs are generally referred to as monitor techs. This reference also applies to Level V EEG techs. The Level V EEG technologist can do both types of EEG recording in the operating room, i.e. from the brain and from the nerve pathways.

There are certain certifications available from the American Board of Registration for EEG technologists, although these certifications are not required in order to move up the various levels, or as a condition of employment. The record is unclear as to whether any employees hold additional certifications. EEG techs primarily work with patients with seizure disorders. The Level III, IV and V EEG techs record the electrical activity of patients' brains, especially epilepsy patients on the 7th Floor of United Hospital. In order to do this they must place electrodes on a person's head, which is done according to an international system for measuring patients' heads, called the international 10/20 system. After determining where the electrode should be placed, the tech abrades the outer layer of skin and places the electrode on with a conductive gel. Then they test to make sure whether the signal is readable, and start to record the EEG. The interoperative monitoring function performed by the Level IV and V EEG techs is not directly related to the Employer's work with seizure disorder patients, and is an offshoot of the core functions of the Employer, similar to the neuro tech work which is also an ancillary service.

Neuro Techs

The neuro techs are responsible for operating equipment necessary for image-guided surgery in the operating room. Image guided surgery is an anatomy based application that enables the surgeons to see in real time where they are in a patient's head, skull or spine.[4]

The neuro tech places fidicual markers on the patient's head. Then a computer creates a 3D model of the patient head, and the surgeon uses the model to locate where the instruments are in the brain during the actual operation. There is no formal training system required by the Employer for this position which only requires a high school diploma. However, one of the current neuro techs has a four-year degree and the other is enrolled in a radiology technology program at a community college. The manufacturer of the equipment provides much of the training for the position.

In terms of job duties, prior to surgery, the neuro tech meets with the patient to place the fiducial markers, and explains the process to the patient. The neuro tech then turns the patient over to the radiology staff, where MRI techs perform MRI scans. The MRI techs are not employees of the Employer. When the MRI is completed, the neuro tech downloads the information, and transports the information to the operating room. The computer then converts the MRI scan to a 3D computer model. Once the patient is brought to the operating room, the neuro tech will have the sterile instruments ready for the surgeon to do the registration, which is the surgeon essentially verifying the accuracy of the fiducial markers. Ultimately, it is the surgeon's decision as to whether or not the markers are correctly placed. The neuro tech will then instruct the surgical techs about how to drape the equipment to keep it sterile. The surgical techs are not employees of the Employer. The neuro tech will troubleshoot the computer system during the operation.

Work-Related Contact Between the Two Classifications

Neuro techs and Level IV and V EEG techs attend some of the same surgeries. For example, both may be in the operating room if a patient has a seizure disorder. The Employer estimated that neuro techs would be in the operating room for less than 10% of seizure disorder cases. However, the record is unclear as to the total percentage of surgeries that both would be involved in, because both neuro techs and EEG techs could be present for operations involving brain tumors or spinal surgery for patients without seizure disorders.

When both are in the operating room each is looking at a computer monitor, though they are tracking different things. While in the operating room, both communicate with the surgeons regarding the information they are receiving from their computers. Both sterilize their equipment after the surgery, although they use different procedures to do so, depending on the equipment. Both also complete a billing function after the surgery is completed, and write a summary of what occurred in the surgery.

[4] There are two brands of image guided surgery used by the surgeons with whom the Employer works: the Stealth System and the Regulus Signus System. The equipment to run the systems is not owned by the Employer.

WORKING CONDITIONS

Supervision

As noted above, the neuro tech position is included in the EEG Department, which is supervised by Carlson. Directly under Carlson is EEG Supervisor Nelson and the Info/Training Supervisor Weiss. Nelson works full-time. Weiss works part-time.

Carlson hires and fires EEG and neuro techs although he does consult with Nelson who sometimes participates in the interviewing process for both unit positions and neuro techs. Nelson also sometimes makes independent recommendations regarding hire for either classification. Nelson supervises the EEG techs, monitor techs and the neuro techs, and is qualified to work as both an EEG tech and a neuro tech. Weiss has no supervisory responsibilities for the neuro techs, but only for the EEG techs. With regard to the Employer's employee evaluation process, Carlson completes the formal evaluations for all employees in the department. Nelson does day-to-day evaluation of the performance of EEG and neuro tech employees. Weiss provides day-to-day evaluations as well, but only for the EEG techs. Carlson usually administers discipline, but Nelson has disciplined EEG techs as well, and it would either be Carlson or Nelson who would discipline the neuro tech employees.

Interchange

There is no evidence that EEG techs perform neuro tech work or that neuro techs perform EEG tech work. However, the record does establish that EEG supervisor Nelson fills in regularly for the neuro tech employees, during a long surgery when the neuro techs need a break. She is the person a neuro tech would go to if questions or problems arose during a surgery. Nelson also fills in for EEG techs when they need breaks. Carlson also testified that he has performed four neuro tech cases in the past year.

Pay and Recording Time Worked

Both groups of employees are hourly paid. The two neuro techs (excluding the tech also employed in information systems) are paid $15.00 and $15.93 per hour. A Level I EEG Associate's starting wage in 2003, was $10.76 per hour. A Level III EEG tech started at $15.81 per hour. A Level V Associate started at $18.36 per hour.

EEG techs punch a time clock. Neuro techs do not punch a time clock, but instead submit time sheets. EEG techs work one of three shifts, which include the day shift from 7:00 a.m. to 3:00 p.m. the evening shift from 3:00 p.m. to 11:00 p.m., and the night shift from 11:00 p.m. to 7:00 a.m. Neuro techs do not work in shifts, and generally work only during the day because their hours are scheduled according to surgeries.

Location of Work

The neuro techs primarily work on the 2nd floor operating rooms of Children's and United Hospitals. They have office space on the 9th floor of United Hospital and sometimes use the 7th Floor EEG tech room as their break room. Supervisor Weiss also has a cubicle on the 9th floor. It is unclear from the record as to where, besides the MRI rooms and the operating rooms, neuro tech patients are seen and/or treated.

The EEG techs have what is referred to as the EEG tech room on the 7th floor of United where EEG equipment is stored and EEG work is done.[5] The 7th floor also serves as a break room for employees of the Employer, and includes a refrigerator, microwave and table. Most of the long-term monitoring for epilepsy is done on the seventh floor of United where there is both an inpatient adult and pediatric unit, though there is some long-term monitoring on other floors and on the third floor of the Richie Building. The EEG techs work in the same operating rooms as the neuro techs.

CONCLUSION

The Employer contends that the Board applies a restrictive standard in accretion cases and urges that employees should not be added to an existing unit unless the employees share an overwhelming community of interest and have no separate identity, citing Beverly Manor – San Francisco, 322 NLRB 968, 972 (1997). The Employer urges that I consider the following factors: interchange of employees; degree of functional integration of operations; contact among employees; nature of skills and training; common supervision; and similarity of working conditions. Archer Daniels Midland Company, 333 NLRB 673, 675 (2001). Further, the Employer asserts that employee interchange and common supervision are the two most important factors.

During the hearing, the Union asserted that the neuro techs should be included in the unit under Premcor, Inc., 333 NLRB 1365 (2001) because they were performing the same basic functions historically performed by bargaining unit employees. However, the Union did not renew its Premcor argument in its post-hearing brief. In any event, I agree with the Employer that the functions of the neuro tech employee are not functions traditionally performed by unit employees and therefore, Premcor is not controlling. In its brief the Union urges that the legal standard for determining unit placement is whether or not the new employees "share common interests" and cites a variety of community of interest factors. The Sun, 329 NLRB 854 (1999).

I recognize that in unit clarification proceedings the Board has utilized accretion principles. In The Sun, cited by the Union, the Board specifically stated that it was not departing from a traditional accretion analysis, except where the bargaining unit is described according to work performed. Because the bargaining unit in this case is not described according to work performed, I conclude that traditional accretion principles apply. Applying those principles, I nevertheless conclude that neuro technicians should be included in the existing unit.

[5] The record suggests some EEG computer work may take place in this room.

The Employer contends, and I agree, that one of the most important factors in applying accretion principles is whether employees are commonly supervised. However, the Employer also contends, "the nature and scope of their supervision is different", when comparing neuro techs and EEG techs, and asserts that neuro techs work "mostly autonomously." I reject the Employer's contention that the record supports a conclusion that the scope of supervision differs. Carlson fires and fires both groups of employees, sometimes with input from Nelson. Carlson evaluates both groups of employees. Carlson or Nelson discipline both groups of employees. Nelson provides breaks during long surgeries for both groups of employees. The only difference in supervision that is clear in the record is that Weiss (who is part-time) exercises supervisory authority over only EEG techs. While the scope of Weiss' duties is not explained in the record, it appears to not include hiring, firing, discipline or evaluating EEG techs. Moreover, it does not appear that Weiss has responsibilities for EEG techs that Nelson does not have for both EEG techs and neuro techs. Thus, I conclude that EEG techs and neuro techs are commonly supervised.

The Employer also contends, and I agree, that interchange is the other most significant factor needed to find accretion. I also agree with the Employer that EEG techs never perform the jobs of neuro techs and neuro techs never perform the jobs of EEG techs. However, there is no evidence that neuro techs (or EEG techs) interchange with any employees of the Employer. Therefore, if I were to conclude that neuro techs should not be placed in the existing unit because of a lack of interchange, implicit in that conclusion is the 2.5 neuro tech employees must be in their own unit because they do not interchange with any employees of the Employer. However, the Board does not approve of fractured units, including combinations of employees that are too narrow in scope. See, Seaboard Marine, 327 NLRB 556 (1999). In this situation, to not include neuro techs in the existing unit because of lack of interchange would result in two separate units of employees in one department of the Employer. I also note that Supervisor Nelson, who is trained as both an EEG tech and a neuro tech, relieves both sets of employees during long surgeries.

The Employer also argues that the skills and training for neuro techs when compared to EEG techs are not "equivalent," that their working conditions differ, and that their services are not functionally integrated. While there is no question that the skills and training are not "equivalent," on the other hand the requirement for obtaining initial employment for either tech position is the same – and that single requirement is a high school diploma. Training for both positions is largely on the job, and it is clear that neither requires any certification or post-high school education. I further conclude that the working conditions of the EEG techs and the neuro techs are similar. Both are hourly paid, and have similar wage ranges and the same benefits. It further appears that labor relations are centralized, as there is one Human Resources Department for the Employer. Differences in recording time and scheduling hours, highlighted by the Employer, are not as important as the similarities. The Employer's contention that the neuro techs and EEG techs are not functionally related is true. However, the record does not suggest that neuro techs are functionally integrated with any employees of the Employer. Rather, any work-related contact they have with other employees is in connection with the operation of the MRI – and the employees employed to operate the MRI are not employees of the Employer. In any event, EEG techs and neuro techs attend the same surgeries at least some of the time, and

whether or not they attend the same surgeries, EEG techs and neuro techs perform similar functions with respect to patients in surgery, i.e. placing fiducial makers/electrodes on patients' heads, utilizing high-tech computer equipment in the operating room to monitor the patients, communicating data (albeit different data), to surgeons during surgery, and sterilizing equipment and recording their observations after surgery.

Finally, I find further support for my conclusion that neuro techs should be included in the existing unit from the Board's *Final Rule on Collective Bargaining Units in the Health Care Industry*, 29 CFR Part 103, 284 NLRB 1580 (1989). In its commentary, the Board expressed concern that some units may be too small for collective bargaining. The Board states at one point, "…we agree that units of two or three employees…would in many cases be impractically small, especially in the health care industry…," and the Board expresses concern over undue proliferation of units. Therefore, "a petitioned for unit of five or fewer employees shall constitute an 'extraordinary circumstance' removing the case from strict application of the rule, and the Board will consider by adjudication what the appropriate scope of the unit should be…in some situations…the small, requested unit might have to be added to a vastly larger unit." 284 NLRB at 1588. See also, Park Manor Care Center, 305 NLRB 872 (1991) (in nonacute care health institutions, the Board considers community-of interest factors, as well as those factors considered relevant by the Board in its rulemaking proceeding).

In finding that the neuro techs should be accreted to the existing unit, I therefore conclude that the following factors support inclusion: (1) common supervision, and inclusion in the same department; (2) the neuro techs are the only unrepresented employees in the EEG department; (3) small number of neuro techs, and the need to avoid proliferation of units in the health care industry; (4) centralized labor relations; (5) similarity in wages, benefits, skills and type of training provided; and (6) common job functions. I emphasize that the lack of interchange and functional integration between the neuro techs and EEG techs would suggest a different result only if the neuro techs either interchanged or were functionally integrated with other employees of the Employer, but nothing in the record suggests that neuro techs interchange or are functionally related to any other employees of the Employer. In fact the placement of the neuro techs in the same department as EEG techs suggests that the Employer views the two as more closely related to one another than to any other parts of the Employer's operation. Gould, Inc., 263 NLRB 442 (1982) (in the normal situation some elements militate toward and some against accretion, so that balance then is necessary).

ORDER

IT IS HEREBY ORDERED that the EEG Technologists, EEG Associates, Recording Technicians and Monitor Technicians unit, exclusively represented for purposes of collective bargaining by Minnesota's Health Care Union, Local 113, Service Employees International Union, be and hereby is, clarified to specifically include neuro technicians employed by the Employer at its St. Paul, Minnesota location.[6]

[6] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 –14th

Signed at Minneapolis, Minnesota, this 22nd day of March 2004.

/s/ Ronald M. Sharp

Ronald M. Sharp, Regional Director
National Labor Relations Board
Eighteenth Region
Suite 790
330 South Second Avenue
Minneapolis, MN 55402

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Street, N.W. Washington, D.C. 20570. This request must be received by the Board in Washington by **April 5, 2004**.